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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39-M) for Authorization, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2007.

Application 05-12-002
(Filed December 2, 2005)

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Service and Facilities of Pacific Gas and Electric Company (U 39-M).

Investigation 06-03-003
(Filed March 2, 2006)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING AGLET CONSUMER ALLIANCE'S
MOTION TO STRIKE REBUTTAL TESTIMONY**

On May 23, 2006, Aglet Consumer Alliance (Aglet) filed a motion to strike portions of the rebuttal testimony served by Pacific Gas and Electric Company (PG&E) on May 17, 2006. PG&E filed a response on May 26, 2006. This Ruling denies Aglet's motion.

Aglet's Motion

Aglet moves to strike the following from Exhibit PG&E-18: (1) narrative testimony from p. 11-10, line 11, through p. 11-12, line 14; and (2) all of Attachment 11-1, "2007-2009 Capital Expenditure Forecast." Aglet contends that rebuttal testimony should be limited to showing that testimony served by other parties is not true. (Black's Law dictionary, definition of "rebuttal.") Aglet

asserts that PG&E's rebuttal does not show that Aglet's testimony is not true. Instead, PG&E attempts to use rebuttal to rehabilitate its weak direct testimony.

Aglet states that PG&E's entire direct showing to justify \$36.2 million of 2007 core plant work at its Diablo Canyon Nuclear Power Plant is a list of project titles. The heart of Aglet's responsive testimony is the statement, "There is nothing in PG&E's testimony or workpapers that justifies a large increase in capital expenditures for Core Plant Work." Aglet believes that the only legitimate rebuttal to its testimony would be a showing that PG&E's direct testimony and workpapers do justify the requested relief. PG&E's rebuttal is not legitimate, according to Aglet, because the rebuttal amends PG&E's direct testimony to explain PG&E's intended capital expenditures for Diablo Canyon. Aglet argues that to allow new information at this late date would be unfair to Aglet and other intervenors that might question the new information.

PG&E's Response

PG&E opposes Aglet's motion. PG&E states that the rebuttal testimony that Aglet moves to strike properly rebuts Aglet's contention that the Commission should authorize capital expenditures during 2007-09 based upon PG&E's historic average of capital expenditures rather than upon the project-specific capital expenditures requested by PG&E. Additionally, PG&E believes that its rebuttal provides a more complete record for deciding the amount of capital expenditures to be authorized in this proceeding. PG&E adds that it did not intend to limit the parties' opportunity to question the information contained in its rebuttal testimony. PG&E states that parties will have ample opportunity to cross examine PG&E's witness in this area.

Ruling

Aglet's testimony asserts that PG&E failed to provide sufficient information to justify its request for \$36.2 million in 2007 for work at PG&E's Diablo Canyon Nuclear Power Plant. PG&E responded in its rebuttal testimony by providing more information to justify its request. The issue presented in Aglet's motion is whether PG&E's rebuttal testimony is proper.

Rebuttal testimony should explain, repel, contradict or disprove an adversary's testimony. (United States v. Laboy, 909 F.2d 581, 588 (1st Cir. 1990.)) A narrow interpretation of this standard supports Aglet's motion, as PG&E's rebuttal does not respond directly to Aglet's testimony that PG&E provided too little information. A broader interpretation would allow PG&E's rebuttal, as it cures a defect in PG&E's case that is identified in Aglet's testimony. By curing the defect, PG&E's rebuttal testimony "repels" Aglet's testimony.

Three factors in this proceeding suggest a broader interpretation is warranted. First, utilities and others cannot intentionally withhold the presentation of salient information until the submission of rebuttal testimony. Aglet does not claim that it previously sought and was denied access to the information contained in PG&E's rebuttal testimony that Aglet moves to strike.

Second, it is unacceptable for utilities to offer only minimal support in their applications, choosing instead to wait and see what issues appear to be of concern to others, and then providing focused rebuttal. Put differently, utilities should not pursue a litigation strategy of waiting until rebuttal testimony to spring information on unsuspecting parties. That does not appear to be the case here; there is no suggestion by Aglet or others that PG&E has pursued such a litigation strategy on a wholesale basis. Rather, Aglet's motion is narrowly

focused on capital projects that total \$36.2 million out of PG&E's multi-billion dollar request for capital expenditures.

Finally, allowing PG&E's rebuttal does not unduly prejudice Aglet. Aglet will have adequate time to assess the rebuttal testimony and an opportunity to cross examine PG&E's witness sponsoring the rebuttal testimony.¹

For the preceding reasons, Aglet's motion to strike PG&E's rebuttal testimony is denied. This Ruling is based on the circumstances described herein; it is not a license for PG&E or any other utility to engage in a litigation strategy of waiting until rebuttal testimony to provide information that should have been included in their direct showing.

Therefore, **IT IS RULED** that the motion of the Aglet Consumer Alliance to strike portions of Pacific Gas and Electric Company's rebuttal testimony is denied.

Dated May 31, 2006, at San Francisco, California.

/s/ Timothy Kenney
Timothy Kenney
Administrative Law Judge

¹ f there were undue prejudice to Aglet, its motion would be granted.

INFORMATION REGARDING SERVICE

Electronic mail addresses that I have provided notification of filing to are listed below.

KMelville@semptra.com;
Service@spurr.org;
aln2@pge.com;
annadel.almenbras@boj.ca.gov;
asteinberg@semptrautilities.com;
atrowbridge@downeybrand.com;
attys@wellingtonlaw.com;
ben@cpuc.ca.gov;
bfinkelstein@turn.org;
carriec@greenlining.org;
case.admin@sce.com;
cem@newsdata.com;
chris@newsdata.com;
chrism@mid.org;
ckt@cpuc.ca.gov;
clarence.binninger@doj.ca.gov;
clyde.murley@comcast.net;
cmkehrein@ems-ca.com;
david_white@transcanada.com;
dbeyer@ebmud.com;
deb@a-klaw.com;
dlf@cpuc.ca.gov;
edwardoneill@dwt.com;
epoole@adplaw.com;
filings@a-klaw.com;
francis.mcnulty@sce.com;
freedman@turn.org;
gayatri@jbsenergy.com;
glw@eslawfirm.com;
gxh@cpuc.ca.gov;
hayley@turn.org;
james.lehrer@sce.com;
jbattey@stewardshipcouncil.org;
jeffgray@dwt.com;
jimross@r-c-s-inc.com;
joe.como@sfgov.org;
johnrredding@earthlink.net;
joyw@mid.org;
jpong@semptra.com;
jsqueri@gmssr.com;
jweil@aglet.org;
karen@klindh.com;
keith.mccrea@sabl原因.com;
kjsimonsen@ems-ca.com;
ljt@cpuc.ca.gov;
lls@cpuc.ca.gov;
lmh@eslawfirm.com;
lra@cpuc.ca.gov;

mdjoseph@adamsbroadwell.com;
mmattes@nossaman.com;
mrafferty805@charter.net;
mrw@mrwassoc.com;
mshames@ucan.org;
nes@a-klaw.com;
norman.furuta@navy.mil;
pfa@cpuc.ca.gov;
pgg4@pge.com;
phanschen@mofo.com;
pucservice@dralegal.org;
raj.pankhania@ci.hercules.ca.us;
rhd@cpuc.ca.gov;
rliebert@cfbf.com;
rmp@cpuc.ca.gov;
rob@clfp.com;
robertg@greenlining.org;
rochelle@a4nr.org;
rschmidt@bartlewells.com;
sfromm@energy.state.ca.us;
sharos@ksee.com;
tim@cpuc.ca.gov;
txb@cpuc.ca.gov;
wendy@econinsights.com;

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Dated May 31, 2006, San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

***** APPEARANCES *****

Tanya Gulesserian
ADAMS BROADWELL JOSEPH & CARDOZO
601 GATEWAY BLVD., SUITE 1000
SOUTH SAN FRANCISCO CA 94080
(650) 589-1660
mdjoseph@adamsbroadwell.com
For: Coalition of California Utility Employees

Marc D. Joseph
Attorney At Law
ADAMS, BROADWELL, JOSEPH & CARDOZO
601 GATEWAY BLVD., STE. 1000
SOUTH SAN FRANCISCO CA 94080
(650) 589-1660
mdjoseph@adamsbroadwell.com
For: Coalition of California Utility Employees

James Weil
AGLET CONSUMER ALLIANCE
PO BOX 37
COOL CA 95614
(530) 885-5252
jweil@aglet.org
For: Aglet Consumer Alliance

Donald Brookhyser
Attorney At Law
ALCANTAR & KAHL LLP
1300 S.W. 5TH AVENUE, SUITE 1750
PORTLAND OR 97201
(503) 402-9900
deb@a-klaw.com
For: Western States Petroleum Association

Nora Sheriff
Attorney At Law
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO CA 94104
(415) 421-4143
nes@a-klaw.com
For: Energy Producers & Users Coalition

Rochelle Becker
ALLIANCE FOR NUCLEAR RESPONSIBILITY
PO BOX 1328
SAN LUIS OBISPO CA 93406
(858) 337-2703
rochelle@a4nr.org
For: Alliance for Nuclear Responsibility

Edward G Poole
ANDERSON DONOVAN & POOLE
601 CALIFORNIA STREET SUITE 1300
SAN FRANCISCO CA 94108
(415) 956-6413
epoole@adplaw.com

Ronald Liebert
Attorney At Law
CALIFORNIA FARM BUREAU FEDERATION
2300 RIVER PLAZA DRIVE
SACRAMENTO CA 95833
(916) 561-5657
rliebert@cbbf.com
For: California Farm Bureau Federation

Robert Neenan
CALIFORNIA LEAGUE OF FOOD PROCESSORS
980 NINTH STREET, NO. 230
SACRAMENTO CA 95812
(916) 444-9260
rob@clfp.com
For: California League of Food Processors

Gregory Heiden
Attorney At Law
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102
(415) 355-5539
gxh@cpuc.ca.gov
For: DRA

Laura J. Tudisco
Attorney At Law
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102
(415) 703-2164
ljt@cpuc.ca.gov
For: DRA

Paul Angelopulo
Attorney At Law
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102
(415) 703-4742
pfa@cpuc.ca.gov
For: DRA

Joe Como
Attorney At Law
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE, RM. 234
SAN FRANCISCO CA 94102
(415) 554-4637
joe.como@sfgov.org
For: City and County of San Francisco

Edward W. O'Neill
Attorney At Law
DAVIS WRIGHT TREMAINE LLP
ONE EMBARCADERO CENTER, SUITE 600
SAN FRANCISCO CA 94111-3834
(415) 276-6582
edwardoneill@dw.com
For: South San Joaquin Irrigation District

Jeffrey P. Gray
Attorney At Law
DAVIS WRIGHT TREMAINE, LLP
ONE EMBARCADERO CENTER, SUITE 600
SAN FRANCISCO CA 94111
(415) 276-6581
jeffgray@dw.com
For: South San Joaquin Irrigation District

Norman J. Furuta
Attorney At Law
DEPARTMENT OF THE NAVY
2001 JUNIPERO SERRA BLVD., SUITE 600
DALY CITY CA 94014-3890
(650) 746-7312
norman.furuta@navy.mil
For: Federal Executive Agencies

Roger Heller
Attorney At Law
DISABILITY RIGHTS ADVOCATES
2001 CENTER STREET, THIRD FLOOR
BERKELEY CA 94704-1204
(510) 665-8644
pucservice@dralegal.org
For: Disability Rights Advocates

Ann L. Trowbridge
Attorney At Law
DOWNEY BRAND, LLP
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO CA 95814
(916) 444-1000
atrowbridge@downeybrand.com

Ann L. Trowbridge
Attorney At Law
DOWNEY BRAND, LLP
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO CA 95814
(916) 444-1000
atrowbridge@downeybrand.com
For: Sacramento Municipal Utility District

Lynn Haug
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO CA 95814
(916) 447-2166
lmh@eslawfirm.com
For: East Bay Municipal Utility District

James D. Squeri
Attorney At Law
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO CA 94111
(415) 392-7900
jsqueri@gmsr.com
For: California Retailers Association

Clyde S. Murley
INDEPENDENT CONSULTANT
600 SAN CARLOS AVENUE
ALBANY CA 94706
(510) 528-8953
clyde.murley@comcast.net
For: San Luis Obispo Mothers for Peace

Gayatri Schilberg
JBS ENERGY
311 D STREET, SUITE A
WEST SACRAMENTO CA 95605
(916) 372-0534
gayatri@jbsenergy.com
For: TURN

Joy A. Warren
Attorney At Law
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO CA 95354
(209) 526-7389
joyw@mid.org
For: Modesto Irrigation District

For: Merced Irrigation District

Peter W. Hanschen
MORRISON & FOERSTER, LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK CA 94596-8130
(925) 295-3450
phanschen@mofo.com
For: AECA

Andrew L. Niven
Attorney At Law
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, SUITE 3109
SAN FRANCISCO CA 94105
(415) 973-7572
aln2@pge.com
For: Pacific Gas and Electric Company

Patrick G. Golden
Attorney At Law
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442, MAIL CODE B30A
SAN FRANCISCO CA 94120-7442
(415) 973-6642
pgg4@pge.com
For: Pacific Gas and Electric Company

James Ross
RCS, INC.
500 CHESTERFIELD CENTER, SUITE 320
CHESTERFIELD MO 63017
(636) 530-9544
jimross@r-c-s-inc.com
For: Cogeneration Association of California

Frank McNulty
Esquire
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD CA 91770
(626) 302-1499
francis.mculty@sce.com

Michael Rochman
SPURR
1430 WILLOW PASS ROAD, SUITE 240
CONCORD CA 94520
(925) 743-1292
Service@spurr.org

Keith R. Mccrea
Attorney At Law
SUTHERLAND, ASBILL & BRENNAN, LLP
1275 PENNSYLVANIA AVE., N.W. STE. 800
WASHINGTON DC 20004-2415
(202) 383-0705
keith.mccrea@sablaw.com
For: California Manufacturers & Technology Association

Carrie Camarena
Attorney At Law
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVE. 2ND FLOOR
BERKELEY CA 94704
(510) 926-4002
carriec@greenlining.org
For: Greenlining

Hayley Goodson
Attorney At Law
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO CA 94102
(415) 929-8876
hayley@turn.org
For: TURN

Matthew Freedman
Attorney At Law
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO CA 94102
(415) 929-8876
freedman@turn.org
For: TURN

Robert Finkelstein
Attorney At Law
THE UTILITY REFORM NETWORK
711 VAN NESS AVE., SUITE 350
SAN FRANCISCO CA 94102
(415) 929-8876 X310
bfinkelstein@turn.org

***** STATE EMPLOYEE *****

Bernard Ayanruoh
Division of Ratepayer Advocates

For: SPURR

RM. 4205
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2453
ben@cpuc.ca.gov
For: DRA

Truman L. Burns
Division of Ratepayer Advocates
RM. 4102
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2932
txb@cpuc.ca.gov
For: DRA

Rashid A. Rashid
Legal Division
RM. 4107
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2705
rhd@cpuc.ca.gov
For: DRA

Sandra Fromm
Energy Specialist
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET
SACRAMENTO CA 95814
(916) 654-4651
sfromm@energy.state.ca.us

Laura Lei Strain
Energy Division
AREA 4A
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-1677
lls@cpuc.ca.gov
For: Energy Division

Timothy Kenney
Administrative Law Judge Division
RM. 5021
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-1626
tim@cpuc.ca.gov

Clayton K. Tang
Division of Ratepayer Advocates
RM. 4205
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2728
ckt@cpuc.ca.gov
For: DRA

Donald J. Lafrenz
Energy Division
AREA 4-A
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-1063
dlf@cpuc.ca.gov
For: Energy Division

***** INFORMATION ONLY *****

Karen Terranova
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, STE 2200
SAN FRANCISCO CA 94104
(415) 421-4143
filings@a-klaw.com

Laura A. Martin
Energy Division
AREA 4-A
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2149
lra@cpuc.ca.gov
For: Energy Division

John R. Redding
ARCTURUS ENERGY CONSULTING
44810 ROSEWOOD TERRACE
MENDOCINO CA 95460
(707) 937-0878
johnredding@earthlink.net

Robert M. Pocta

Reed V. Schmidt

Division of Ratepayer Advocates
RM. 4205
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2871
rmp@cpuc.ca.gov
For: DRA

CALIFORNIA ENERGY MARKETS
517 - B POTRERO AVENUE
SAN FRANCISCO CA 94110
(415) 552-1764
cem@newsdata.com

Chris Raphael
CALIFORNIA ENERGY MARKETS
517-B POTRERO AVENUE
SAN FRANCISCO CA 94113
(510) 932-8029
chris@newsdata.com

Clarence Binninger
Deputy Attorney General
DEPARTMENT OF JUSTICE
ENERGY & CORPORATE RESPONSIBILITY SECTION
455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO CA 94102
(415) 703-5528
clarence.binninger@doj.ca.gov

David Beyer
EAST BAY MUNICIPAL UTILITY DISTRICT
375 11TH STREET
OAKLAND CA 94607
(510) 287-1144
dbeyer@ebmud.com

Wendy L. Illingworth
ECONOMIC INSIGHTS
320 FEATHER LANE
SANTA CRUZ CA 95060
(831) 427-2163
wendy@econinsights.com

Greggory L. Wheatland
Attorney At Law
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO CA 95814
(916) 447-2166
glw@eslawfirm.com

Carolyn Kehrein
ENERGY MANAGEMENT SERVICES
1505 DUNLAP COURT

BARTLE WELLS ASSOCIATES
1889 ALCATRAZ AVENUE
BERKELEY CA 94703-2714
(510) 653-3399
rschmidt@bartlewells.com

Kevin J. Simonsen
ENERGY MANAGEMENT SERVICES
646 EAST THIRD AVENUE
DURANGO CO 81301
(970) 259-1748
kjsimonsen@ems-ca.com

David White
GAS TRANSMISSION NORTHWEST
1400 SW FIFTH AVE.
PORTLAND OR 97201
(503) 833-4321
david_white@transcanada.com

Raj N. Pankhania
HERCULES MUNICIPAL UTILITY
111 CIVIC DRIVE
HERCULES CA 94547
(510) 799-8208
raj.pankhania@ci.hercules.ca.us

Sharokinae Shams
Reporter
KSEE-24 NEWS
5035 E. MCKINLEY AVE.
FRESNO CA 93726
sharos@ksee.com

Karen Lindh
LINDH & ASSOCIATES
7909 WALERGA ROAD, NO. 112, PMB119
ANTELOPE CA 95843
(916) 729-1562
karen@klindh.com

Christopher J. Mayer
MODESTO IRRIGATION DISTRICT
PO BOX 4060
MODESTO CA 95352-4060
(209) 526-7430
chrism@mid.org

MRW & ASSOCIATES, INC.
1999 HARRISON STREET, SUITE 1440
OAKLAND CA 94612
(510) 834-1999
mrw@mrwassoc.com

DIXON CA 95620-4208
(707) 678-9506
cmkehrein@ems-ca.com

Annadel Almendras
OFFICE OF THE ATTORNEY GENERAL
455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO CA 94102
(415) 703-5565
annadel.almenbras@boj.ca.gov

Jayne Battey
PACIFIC FOREST AND WATERSHED LANDS STEWA
303 VINTAGE PARK DRIVE, SUITE 150
FOSTER CITY CA 94404
(650) 286-5150
jbattey@stewardshipcouncil.org

Keith Melville
Attorney At Law
SAN DIEGO GAS & ELECTRIC COMPANY
101 ASH STREET, HQ 13D
SAN DIEGO CA 92101
(619) 699-5039
KMelville@sempra.com

Andrew Steinberg
SAN DIEGO GAS & ELECTRIC/SOCALGAS
555 WEST FIFTH STREET, GT14D6
LOS ANGELES CA 90071
(213) 244-3817
asteinberg@semprautilities.com

Johnny Pong
SAN DIEGO GAS & ELECTRIC/SOCALGAS
555 WEST FIFTH STREET, GT14E7
LOS ANGELES CA 90071
(213) 244-2990
jpong@sempra.com

Morgan Rafferty
SAN LUIS OBISPO MOTHERS FOR PEACE
PO BOX 164
PISMO BEACH CA 93448
(805) 474-4220
mrafferty805@charter.net

Case Administration
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE., RM. 370

Martin A. Mattes
Attorney At Law
NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
50 CALIFORNIA STREET, 34TH FLOOR
SAN FRANCISCO CA 94111
(415) 438-7273
mmattes@nossaman.com

James M. Lehrer
RUSSEL WORDN; JOHN HUGHES
Attorney At Law
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD CA 91770
(626) 302-3252
james.lehrer@sce.com

Robert Gnaizda
Attorney At Law
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLOOR
BERKELEY CA 94704
(510) 926-4006
robertg@greenlining.org

Michael Shames
Attorney At Law
UTILITY CONSUMERS' ACTION NETWORK
3100 FIFTH AVENUE, SUITE B
SAN DIEGO CA 92103
(619) 696-6966
mshames@ucan.org

Robert Rathie
WELLINGTON LAW OFFICE
857 CASS STREET, SUITE D
MONTEREY CA 93940
(831) 373-8733
attys@wellingtonlaw.com

A.05-12-002, I.06-03-003 TIM/avs

ROSEMEAD CA 91770
(626) 302-4875
case.admin@sce.com